In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 442

HOUSTON H. FEASTER, INDIVIDUALLY AND AS DIRECTOR, ALABAMA STATE DOCKS DEPARTMENT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. In July, 1959, the International Brotherhood of Firemen and Oilers, Helpers, Roundhouse and Railway Shop Laborers filed an application with the National Mediation Board to investigate a representation dispute among certain employees of the Alabama State Docks Department (R. 38).[1] The Docks Department is an agency of the State of Alabama. 38 Ala. Code § 1(9) (1958 ed.). It operates the publicly owned port facilities at Mobile. Included in this operation are a terminal railway, general cargo piers and ware-

[1] "R." references are to the printed record in the court of appeals, which has been filed in this Court.

277-870—67

houses, a grain elevator, a cold storage plant, a plant for storage and loading of edible fats and oils, and a special unloading facility for bulk ores (R. 100–106, 110–112). The employees operating the terminal railway are presently represented by unions certified under the Railway Labor Act (R. 112). The asserted representation dispute involves all Docks Department employees at Mobile, except office and clerical employees and employees in crafts or classes covered by existing collective bargaining agreements (R. 38).

Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. 152, Ninth, requires the Board to investigate disputes among employees of a carrier as to who are their representatives, if a party to the dispute requests such an investigation. Under Board procedures, the union making this application generally must present authorization cards which the Board's mediator will then check against the carrier's records to determine if a representation dispute actually exists among employees covered by the Act (R. 31, 34–35). In this connection, Section 2, Ninth, provides that:

> The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

In September, 1961, after repeated refusals by the Docks Department to permit the Board's mediator to inspect the records covering the employees involved, the United States brought this action against petitioners—the State of Alabama, the State Docks Department and two officials thereof (R. 137). The complaint

sought to restrain the petitioners from denying the Board access to books and records showing the names, addresses, and job classifications of the employees of the Docks Department and to direct the two officials to produce the books and records containing this information (R. 11). In April, 1963, the district court dismissed the complaint, without opinion. In April, 1964, the Fifth Circuit reversed and remanded for further proceedings. *United States* v. *Feaster et al.*, 330 F. 2d 671. It determined that the Board had a judicially enforceable right to access to the books and records if the Docks Department was a "carrier" within the meaning of Section 1, First, of the Act, 45 U.S.C. 151, First. That section defines a carrier so as to include:

> any * * * carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad * * *.

In December, 1964, the United States moved the district court for summary judgment and a preliminary injunction (R. 16, 21). The motion relied on the following undisputed facts: (1) the "Terminal Railway Alabama State Docks" is subject to the Interstate Commerce Act and, in its annual reports to the

ICC, expressly stated that the railway is not a separate entity, but "is considered as part of the Alabama State Docks" (R. 25, 93); (2) in addition to the Terminal Railway, the Docks Department "maintains and operates" the various loading and storage facilities at Mobile (R. 13, 102–104); and (3) the Bulk Materials Handling Plant and the Cotton Compress and Warehouse both receive and discharge large quantities of commodities transported by rail, while the Grain Elevator and the Cold Storage Plant receive large quantities of rail shipments (R. 102–104). In opposing the motion, petitioners averred that, while under common ownership and ultimate control, the Railway and the loading and storage facilities were operated by the Docks Department as separate and distinct facilities of the State (R. 110).

On September 22, 1965, having previously denied the motion for summary judgment, the district court denied the government's motion for a preliminary injunction (R. 129, 130). On appeal, the Fifth Circuit again reversed, and directed the entry of an order granting the Board access to the records. The court reasoned that at the present stage of the proceedings there was no need for judicial resolution of whether the Docks Department is a "carrier" within the meaning of the Railway Labor Act, and that the Board's administrative determination of the jurisdictional issue of carrier status was sufficient to establish that its investigation of the alleged representation dispute "was not incompetent or irrelevant to [the Board's lawful] purpose, and not arbitrary, capricious or

without foundation" (Pet. App. 20–24). Judge Gewin dissented.

2. The decision below merely applies the well settled principle that an administrative agency's authority to inspect records must be sustained if the evidence sought is not "plainly incompetent or irrelevant to any lawful purpose" of the agency. *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501, 509; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186. The only question here is whether the Alabama State Docks Department, whose records the National Mediation Board seeks to inspect in this case, is a "carrier" within the meaning of the Railway Labor Act and therefore subject to the jurisdiction of the Board. And there is no dispute as to the governing standards for resolving that issue; they are set forth in the Act. Thus, the disagreement in this case is over the question of whether the Board has the authority to make a threshold determination of jurisdiction, without the necessity of a determination by the Interstate Commerce Commission that the employer involved is a "carrier" within the meaning of the Act (Pet. 13), and, if so, whether on the basis of the evidence adduced in the district court, there was a sufficient showing as to "carrier" status of the Alabama State Docks Department to demonstrate that the administrative demand for records was not plainly incompetent or irrelevant to a lawful purpose. We submit the decision below is correct on both points and does not warrant further review.

There can be no doubt that the initial determination of its own jurisdiction is a proper function for

an administrative body. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49–50. Nor is the Board's preliminary assertion of jurisdiction here without basis on the present record. As above noted, for the purposes of the Act, the term "carrier" includes not only railroads subject to the Interstate Commerce Act but also "any company which is * * * owned * * * by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service" in connection with the elevation, refrigeration, storage and handling of rail shipments. (45 U.S.C. 151, First). Even if operated as separate entities, the loading, refrigeration and storage facilities, as well as the terminal railway, manifestly come within this definition.

In sum, there is no reason to delay further the Board's performance of its statutory responsibilities in this now eight year old representation dispute. The congressional policy of insuring "prompt" settlement of labor disputes (45 U.S.C. 151a), would not be served by "dragging out of the controversy [in the courts]." *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 305. Indeed, Section 2, Ninth, of the Act itself requires the Board to complete its investigation and certify an employee representative within 30 days after its services are invoked. 45 U.S.C. 152, Ninth.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

SEPTEMBER 1967.

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